No. 84-9 (10)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY and CECILIA STEVENSON,

Petitioners,

v.

DORIS RUSSELL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS FOR ALASKA FISHERMEN'S UNION-SALMON CANNERS PENSION TRUST, ALASKA FISHERMEN'S UNION-SALMON CANNERS WELFARE TRUST, ALASKA PLUMBING & PIPEFITTING INDUSTRY PENSION TRUST FUND, MONTANA TEAMSTER EMPLOYERS TRUST, NATIONAL SHOPMEN PENSION FUND, NORTHWEST METAL CRAFTS TRUST FUND, OREGON TEAMSTER EMPLOYERS TRUST, PRINTING SPECIALTIES AND PAPER PRODUCTS JOINT EMPLOYER AND UNION HEALTH AND WELFARE FUND, RETAIL CLERKS PENSION TRUST, RETAIL CLERKS WELFARE TRUST, SOUTHERN CALIFORNIA LUMBER INDUSTRY HEALTH AND WELFARE FUND, SOUTHERN CALIFORNIA LUMBER INDUSTRY RETIREMENT FUND, AND SPOKANE AREA HOTEL AND RESTAURANT EMPLOYEES TRUST FUND

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QUESTION PRESENTED

Whether, under the Employee Retirement Income Security Act, a fiduciary of an employee benefit plan may be held personally liable to a plan participant or beneficiary for punitive or compensatory damages for improper or untimely processing of benefit claims?

PARTIES TO THE PROCEEDING

Massachusetts Mutual Life Insurance Company*

Cecilia Stevenson

Doris Russell

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* The following are non-wholly owned subsidiaries of the Massachusetts Mutual Life Insurance Company as well as companies that may be deemed affiliates thereof:

MML Blend Investment Company, Inc.
MML Equity Investment Company, Inc.
MML Managed Bond Investment Company, Inc.
MML Money Market Investment Company, Inc.
MML Bay State Life Insurance Company
MassMutual Corporate Investors, Inc.
MassMutual Income Investors, Inc.
MassMutual Mortgage and Realty Investors
MassMutual Liquid Assets Trust
Maslif One & Co.

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The amici curiae Alaska Fishermen's Union-Salmon Canners Pension Trust, Alaska Fishermen's Union-Salmon Canners Welfare Trust, Alaska Plumbing & Pipefitting Industry Pension Trust Fund, Montana Teamster Employers Trust, National Shopmen Pension Fund, Northwest Metal Crafts Trust Fund, Oregon Teamster Employers Trust, Printing Specialties and Paper Products Joint Employer and Union Health and Welfare Fund, Retail Clerks Pension Trust, Retail Clerks Welfare Trust, Southern California Lumber Industry Health and Welfare Fund, Southern California Lumber Industry Retirement Fund, and Spokane Area Hotel and Restaurant Employees Trust Fund, respectfully submit this brief in support of the petitioners in the above-captioned case, pursuant to Rule 36.3 of the Supreme Court rules. The amici curiae have obtained the consent of counsel for both the petitioner and the respondent.

The amici curiae have an interest in this action because they are multiemployer pension and health and welfare plans organized under the authority of the Taft-Hartley Act and the Employee Retirement Income Security Act (ERISA).

The Alaska Fishemen's Union-Salmon Canners Pension Trust is a pension plan with 1,191 participants and 13 contributing employers. It received 40 claims during its last reporting year. The Alaska Fishermen's Union-Salmon Canners Welfare Trust is a health and welfare plan with 1,122 participants and 13 contributing employers. It received 893 claims during its last reporting year. The Alaska Plumbing & Pipefitting Industry Pension Trust Fund is a pension plan with 1,357 participants and 200 contributing employers. It received 49 claims during its last reporting year. The Montana Teamster Employers Trust is a health and welfare plan with 1,904 participants and 179 contributing employers. It received 28,600 claims during its last reporting year. The National Shopmen Pension Fund is a pension plan with

17,000 participants and 283 contributing employers. It received 480 claims during its last reporting year. The Northwest Metal Crafts Trust Fund is a health and welfare plan with 5,695 participants and 139 contributing employers. It received 20,000 claims during its last reporting year. The Oregon Teamster Employers Trust is a health and welfare plan with 17,600 participants and 993 contributing employers. It received 58,200 claims during its last reporting year. The Printing Specialties and Paper Products Joint Employer and Union Health and Welfare Fund is a health and welfare plan with 8,400 participants and 126 contributing employers. It received 102,000 claims during its last reporting year. The Retail Clerks Pension Trust is a pension plan with 25,153 participants and 738 contributing employers. It received 258 claims during its last reporting year. The Retail Clerks Welfare Trust is a welfare plan with 17,100 participants and 667 contributing employers. It received 222,672 claims during its last reporting year. The Southern California Lumber Industry Health and Welfare Fund is a health and welfare plan with 8,200 participants and 560 contributing employers. It received 42,000 claims during its last reporting year. The Southern California Lumber Industry Retirement Fund is a pension plan with 7,600 participants and 460 contributing employers. It received 420 claims during its last reporting year. The Spokane Area Hotel and Restaurant Employees Trust Fund is a health and welfare plan with 659 participants and 25 contributing employers. It received 4,263 claims during its last reporting year. Together, these plans processed 479,775 claims during their last reporting year.

The Ninth Circuit's ruling below has extraordinarily severe implications for the administration and financial well-being of all employee benefit plans. But, that decision has particularly severe consequences for multiemployer plans.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 722 F.2d 482 (9th Cir. 1983), and appears in the Appendix to the petition at pages 1a to 25a. The order of the United States District Court for the Central District of California granting petitioner's motion for summary judgment, as well as the findings of fact and conclusions of law issued in connection therewith, are unreported and appear in the Appendix to the petition at pages 26a to 32a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 16, 1983. A timely petition for rehearing and suggestion for rehearing en banc was denied by that Court on April 6, 1984. Appendix to petition at page 34a. The petition for writ of certiorari was docketed on July 5, 1984. The jurisdiction of this Court was invoked by petitioners pursuant to 28 U.S.C. § 1254(1). This Court granted certiorari on October 1, 1984.

STATUTES AND REGULATIONS INVOLVED

This case involves Sections 409, 501, 502 and 503 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. §§ 1109, 1131, 1132, and 1133, and 29 C.F.R. § 2560.503-1 promulgated pursuant to ERISA § 503. These provisions are reproduced in the Appendix to the petition at pages 35a to 48a.

STATEMENT OF THE CASE

Respondent, Doris Russell (Russell), was an employee of a California office of the petitioner, Massachusetts Mutual Life Insurance Company (Mass Mutual).[1] Mass Mutual sponsors two employee benefit plans which provide disability benefits to eligible employees. Both plans are provided at no cost to employees and are funded by the general assets of the company. Both plans are covered by ERISA.[2]

[1] Amici Curiae accept petitioner's statement of the case, but provide a synopsis of it herein.

Russell filed a disability claim under the company's salary continuance plan in May, 1979, asserting that she could not work because of a back problem. Mass Mutual began payment of benefits.

In August, 1979, the claim was reviewed by Mass Mutual's Disability Committee. The Disability Committee referred Russell to an orthopedic surgeon. In September, 1979, this specialist examined Russell and concluded that, from an orthopedic perspective, she was not physically disabled. On October 17, 1979, Russell was notified that disability payments would be discontinued upon the recommendation of the Disability Committee. Russell was also advised of her right to appeal that decision to the Plan Administrator.

On October 22, 1979, Russell wrote to the Director of Group Claims (not to the Plan Administrator) and asked for additional information regarding the termination of her benefits and for an application for long-term disability benefits. She also stated her intention to appeal the termination of her disability benefits and to submit additional medical information.

On November 27, 1979, Russell wrote to the Plan Administrator concerning her appeal and submitted additional evidence, including a report from her psychiatrist which indicated that she was suffering from a psychosomatic disability with physical manifestations rather than an orthopedic disability.

The Mass Mutual Plan Administrator treated Russell's letter of November 27, 1979 as a formal appeal and referred it to the Disability Committee. Russell was examined by an independent psychiatrist, who confirmed that Russell suffered from a psychiatric disability in a report dated February 15, 1980. On the

[2] Petitioner Cecilia Stevenson, an employee of Mass Mutual, was Russell's supervisor at Mass Mutual.

basis of this report, the Disability Committee recommended that Russell's benefits be reinstated retroactively. The Plan Administrator adopted this recommendation and informed Russell of his decision on March 11, 1980. Payment of all benefits due was made two days later.

Although she received full benefits from both plans, Russell sued Mass Mutual in California Superior Court on December 9, 1980 for compensatory and punitive damages for the "untimely and improper" handling of her benefit claim,[3] which allegedly resulted in economic loss and mental anguish.[4]

After removal of the case to the United States District Court for the Central District of California on the ground that the case was governed by ERISA,[5] the District Court granted a motion by Mass Mutual for summary judgment. The court first held that all of Russell's state law claims arising from the processing of her claim for disability benefits were pre-empted by ERISA. The court then concluded that, as a matter of law, punitive and compensatory damages are not available to plan participants under ERISA. By so ruling, the court tacitly acknowledged that a plan participant only has a claim against the plan for non-payment of benefits and costs of litigation, including fees. Because Russell had been paid benefits in full, she was not entitled to any additional relief. The Court found that

[3] Other employment-related claims were also asserted; the only claim addressed herein by the amici curiae is Russell's claim with respect to her disability benefits.

[4] Russell claimed, *inter alia*, that Mass Mutual's delay forced her husband, who was also unemployed on the grounds of disability, to cash out his retirement savings plan. Russell alleged that she and her husband lost the security of lifetime benefits. Russell also sought damages for emotional distress and claimed that her pre-existing psychosomatic illness was aggravated as a result of the improper and untimely handling of her claim.

[5] Mass Mutual removed this action pursuant to 28 U.S.C. § 1441 (a), alleging the existence of federal jurisdiction under 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331(a).

Russell's appeal was filed on November 27, 1979 and rejected her contention that she was entitled to damages because her claim had not been processed in 120 days, as required by regulations promulgated under ERISA § 503, 29 U.S.C. § 1133. See 29 C.F.R. § 2560.503-1(h) (1983).[6]

The Ninth Circuit affirmed the District Court's holding that Russell's state law claims were pre-empted by ERISA. However, the Ninth Circuit reversed the District Court's grant of summary judgment. The appellate court held that Russell's complaint had stated a claim under ERISA for breach of fiduciary duty based on the allegedly improper or untimely handling of her appeal. The Court of Appeals determined that Russell's appeal began with her initial letter of October 22, 1979 and that Mass Mutual, therefore, rendered its final determination *twelve days* beyond the 120-day limit.

The Court of Appeals went on to hold that such a claim could support an award of both compensatory and punitive damages. The appellate court based its opinion on an interpretation of ERISA § 409, 29 U.S.C. § 1109. It held that Section 409, which expressly imposes upon fiduciaries a *personal* liability to the plan for fiduciary breaches, also makes fiduciaries personally liable to individual participants with respect to benefit claims. The Ninth Circuit is the only appellate court to have held that Section 409 authorizes recovery against plan fiduciaries by individual participants for denial of a benefit claim.

SUMMARY OF ARGUMENT

The ruling of the Ninth Circuit is inconsistent with both the terms of ERISA and the Act's underlying legis-

[6] The regulations which require benefit claims to be decided within 120 days do not provide affirmative relief. These regulations simply provide that, in the event of the plan's failure to render a decision within that time, "the claim shall be deemed denied on review." 29 C.F.R. § 2560. 503-1(h)(4). The participant can then file suit under ERISA Section 502 without fear that a defense of failure to exhaust remedies can be raised.

lative policy. ERISA, which is a "comprehensive and reticulated statute", provides two distinct and separate sets of remedies: one for employee benefit plans themselves and one for benefit claimants. The remedies available to employee benefit plans are contained in ERISA Section 502. That provision expressly authorizes awards of personal liability against plan trustees and other fiduciaries who breach their fiduciary obligations to the plan. The exclusive remedies available to persons claiming that benefits were erroneously denied them or that claims were improperly processed are set forth in ERISA Section 409. The latter provision specifically limits relief to the benefits due plus attorneys' fees and other costs of litigation. Remedies under Section 409 are awarded against plans only. Section 409 does *not* authorize awards of damages against trustees or other fiduciaries personally. Neither of these carefully crafted remedial provisions authorizes awards of either punitive or extra-contractual compensatory damages.

Congress, by creating a separate remedial provision for persons seeking benefits, balanced the need to encourage care in the administration of benefit claims with its express policy of encouraging the growth of the private pension system. The Ninth Circuit's rewriting of ERISA's remedial scheme has upset the balance struck by Congress. Unless it is overruled, the decision below will cause serious injury to multiemployer benefit plans and hence to their participants.

The ruling below will severely injure multiemployer plans because it will undermine the prudent and careful administration of such plans. Out of a fear of litigation and concomitant risk of personal liability, trustees and fiduciaries will become likely to acquiesce in questionable claims to the detriment of a plan's financial soundness. The ruling will also injure multiemployer funds by effectively deterring responsible persons from serving as trustees and fiduciaries.

The ruling below will further injure multiemployer plans by irretrievably damaging the informal dispute resolution process favored by the Act. With the prospect of personal liability facing them in every case of benefit determination or administration, plan trustees are likely to become far less flexible in resolving benefit claims out of a concern that a change of mind will later be asserted as evidence of impropriety. The lack of flexibility will inevitably result in increased litigation. Indeed, some benefit claimants may be encouraged to forego an informal resolution in the hope of also obtaining a windfall award of punitive damages.

ARGUMENT

I. The Ninth Circuit's Ruling is Inconsistent with ERISA's Terms and Underlying Policy

The Ninth Circuit's ruling that punitive and extra-statutory compensatory damages may be awarded to plan participants and beneficiaries is contrary to the plain words of ERISA. It is, moreover, inimical to the carefully tailored policies established by federal pension law. The Ninth Circuit's ruling is in error principally for two reasons. ERISA was carefully crafted by Congress to provide that awards of damages against trustees or other fiduciaries personally were to be only in favor of the funds themselves and *not* individual participants and beneficiaries. And, ERISA does not authorize the awarding of punitive damages to anyone.

In this section of our brief we first outline (in Part A) the different rules established by ERISA to protect plans as a whole and individuals entitled to benefits. We next (in Part B) review the remedial provisions of ERISA and show that they do not permit recovery by individual claimants from fiduciaries for benefit claims decisions. We then demonstrate (in Part C) that ERISA contains no authorization for awards of punitive damages. Finally (in Part D), we show that the Ninth Circuit's ruling has upset, without justification, the carefully crafted statutory scheme enacted by Congress.

A. *ERISA Established Interrelated but Separate Rules to Protect Employee Benefit Plans and their Individual Participants and Beneficiaries*

As this court has observed, ERISA is a "comprehensive and reticulated statute" in which Congress established many detailed rules to further "the well-being and security of millions of employees and their dependents" and to remedy the numerous flaws in the private pension plan system. *Nachman Corp. v. PBGC,* 446 U.S. 359, 361 (1980), reh. denied, 448 U.S. 908 (1980). ERISA improved the benefit security of Americans in two distinct ways: it promoted the financial integrity and growth of employee benefit plans and it established rules protecting the receipt of benefits by individuals. The two approaches were clearly interrelated, since the financial stability of plans ultimately protects the benefits of participants entitled to benefits under the plans.

ERISA protects individual benefits through participation and vesting requirements, and through reporting and disclosure rules. The vesting and participation rules protect individuals' entitlement to benefits. The reporting and disclosure rules protect the right of individuals to receive information about plan benefits.

Congress also wanted to promote the growth of employee benefit plans because such growth would lead to improved benefit security for millions of Americans. ERISA promotes the growth and stability of employee benefit plans by establishing funding requirements for plans and rules for fiduciary behavior. The funding rules require plans to provide adequate long-term funding for benefits payable in the future. The fiduciary rules impose strict requirements of prudence and impartiality upon all persons having discretionary authority over plan assets. However, the fiduciary rules, while stringent, do not deter qualified individuals from serving as plan fiduciaries because they are clear and do not

penalize fiduciaries for informed good faith discretionary decisions.

B. *ERISA Provides Remedies for Individuals Which Are Different from Those Available to Plans*

ERISA differentiates between remedies available to plans themselves and remedies available to individual participants and beneficiaires who are claiming benefits. The statute expressly imposes personal liability upon fiduciaries to make plans whole for any loss resulting from a breach of a fiduciary obligation or to disgorge any profit made as a result of such breach. Indeed, ERISA also provides for payment of excise taxes by fiduciaries and other parties in interest who violate the prohibited transaction rules (which prohibit self-dealing). The excise taxes are assessed and collected by the Internal Revenue Service. 26 U.S.C. § 4975. But, ERISA does not authorize the assessment of personal liability in favor of a plan beneficiary who has sued with respect to a benefit determination.

The remedies of personal liabilty are reserved for breaches of fiduciary duties to plans themselves because ERISA's rules of fiduciary conduct were designed principally to protect plans from losses caused by fiduciary malfeasance or negligence. An erroneous benefit determination or inappropriate administration of a claim does not result in an economic loss to an employee benefit plan. The Fund would, in any event, eventually be required to pay the claim. Neither does an erroneous benefit determination result in any personal financial benefit to a plan fiduciary. An assessment of personal liability against a fiduciary in favor of a benefit claimant simply is not consistent with the Act's fiduciary scheme.

The separateness of the Act's two remedial schemes is especially evident when one notes that ERISA § 409 provides equitable and remedial relief for fiduciary

breaches *only* to plans themselves. That provision is *not* applicable to relief sought by individual participants.[7] Relief for individual participants and beneficiaries who have been denied benefits is *exclusively* pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). This latter provision does *not* authorize the imposition of personal liability upon fiduciaries for any compensatory or punitive damages to individual participants or beneficiaries. Rather, it limits benefit claimants to recovery of benefits due from the plan and to costs of litigation, including attorneys' fees.

The Ninth Circuit's ruling effectively rewrites the latter provision. By imposing upon plan fiduciaries extrastatutory personal liability for their benefit determinations and administration, the Ninth Circuit substituted its judgment for the policy choices made by Congress when it enacted and amended ERISA.

C. *ERISA Does not Provide for any Imposition of Punitive Damages*

While ERISA provides detailed remedies to plans and beneficiaries and imposes the payment of excise taxes as a penalty for some violations, it makes absolutely *no* provision for the imposition of *any* punitive damages payable to plans or to individual claimants. The personal liability of fiduciaries for fiduciary breach is designed to compensate the plan for any actual loss or for income

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[7] ERISA's legislative history confirms that any recovery under Section 409 necessarily benefits the plan as a whole. See, e.g. H. Conf. Rep. No. 1280, 93d Cong., 2nd Sess., p. 320 (1974), reprinted in *Legislative History of the Employee Retirement Income Security Act of 1974 (Legislative History)* (1976) U.S. Government Printing Office, p. 4587 (personal liability of fiduciary for losses to the plan resulting from fiduciary breach) and S. Rep. No. 127, 93d Cong., 1st Sess. 33 (1973), reprinted in *Legislative History*, p. 619 (personal liability of fiduciary to reimburse fund for losses resulting from fiduciary breach and to turn over any profits obtained by use of fund assets).

that should have inured to the plan but for the breach. Similarly, a plan's liability to an individual entitled to a benefit is limited to the benefit and the costs incurred in any litigation to obtain the benefit.

The Eighth Circuit has recognized that punitive damages are not available to individual benefit claimants under ERISA. In *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir. 1981), cert. denied, 454 U.S. 968 (1981), that court stated:

> We do not think that punitive damages are provided for in ERISA. Ordinarily punitive damages are not presumed; they are not the norm; and nowhere in ERISA are they mentioned. If Congress had desired to provide for punitive damages, it could have easily so stated, as it has in other acts.

653 F.2d at 1216; see also *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 825-26 (7th Cir. 1984), which held that punitive damages are not available in an action for plan benefits under ERISA § 502(a)(1)(B). The Eighth Circuit recognized that the extraordinary remedy of punitive damages could not be added to ERISA by judicial fiat. So too has a strong majority of the district courts that have considered the question. See *Whitaker v. Texaco*, 566 F. Supp. 745 (N.D. Ga. 1983) and cases cited therein.

This court has also held, in a recent decision, that punitive damages cannot be recovered from a municipality under 42 U.S.C. § 1983 (the Civil Rights Act of 1866) because nothing in that law or its legislative history indicated that Congress intended to abolish the traditional municipal immunity from punitive damages. *Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 263-64 (1981). This Court found, in that case, that "the exclusion of punitive damages was no oversight," but, rather, a deliberate Congressional choice. 453 U.S. 265. Similarly, in the case of ERISA, Congress' exclusion of

punitive damages from the statutory framework of ERISA was not an oversight that should be remedied by judges. It was a deliberate policy choice. Congress considered, and adopted, a myriad of remedial measures designed to secure the financial integrity of employee benefit plans and the rights of individuals entitled to benefits under those plans. Congress simply did not find that the draconian remedy of punitive damages was necessary for its purposes.

D. *By Effectively Altering the Provisions of ERISA, The Ninth Circuit Has Usurped the Legislative Function*

The different remedial provisions of Sections 409 and 502 reflect the delicate balance struck by Congress among the multiple purposes served by ERISA. Among the most important of those purposes are: (1) the promotion of the expansion of the private pension plan system; (2) the deterrence of fiduciary malfeasance; and (3) the securing of benefits expected by individual participants and beneficiaries. Congress balanced the prophylactic effect of the imposition of personal liability upon fiduciaries as a deterrence for malfeasance against the need to promote expansion of pension plans. Congress determined that personal liability to the plan for fiduciary breaches would deter malfeasance, but that excessive imposition of personal liability (such as was created by the Ninth Circuit) would hamper the creation of new plans, the expansion of existing ones, and the recruitment of plan trustees.

Congress, in balancing competing concerns, clearly felt that deterrent measures (such as the imposition of personal liability) designed to prevent abuses of plan resources were not an appropriate way of dealing with errors made in connection with benefit claims by participants. Balancing the need for encouraging the exercise of care in benefit claim determinations and adminis-

tration against its policy of promoting pension plan expansion, Congress authorized full recovery of benefits due to individuals from plans, as well as costs of litigation (including attorneys' fees). But, it did not go so far as to impose personal liability upon plan fiduciaries for either compensatory or punitive damages. ERISA is carefully crafted to deter malfeasance in the management of plans, provide remedies to individual claimants, and yet not create barriers to the expansion of the private pension system. This Court has, in other circumstances, observed that there must be a "careful balance of individual and collective interests" in *Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979) (punitive damages are not available for claims of breach of duty of fair representation under the Railway Labor Act, 45 U.S.C. §§ 151 et seq.). Congress created such a balance in ERISA.

One additional point must be made concerning the Ninth Circuit's rewriting of ERISA's remedial provisions. Congress designed ERISA to be a nationwide, uniform system of administration for employee benefit plans. Prior to ERISA, such plans were governed by the principles of trust law, which varied considerably from state to state. Such state variation precluded uniform plan administration and was particularly prejudicial to large nationwide plans, such as collectively bargained multiemployer plans. One of Congress' purposes in passing ERISA was to remedy this problem:

> The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state law.

Report of House Education and Labor Committee on H.R. 12906, 93rd Cong., 2nd Sess. 1974, reprinted in *Legislative History of the Employee Retirement Income Security Act* (1976) U.S. Government Printing Office,

p. 3308. The grafting of punitive damages onto the framework of ERISA would subvert the goal of national uniformity. This is so because punitive damages are generally awarded pursuant to state law principles. The exposure of plan fiduciaries to such damages will result in divergent, inconsistent rulings throughout the many courts of this country.

The Ninth Circuit upset the careful balance struck by Congress without any justification. The imposition of personal liability upon plan fiduciaries for prior errors in claims processing does not significantly add to the deterrent effect of the measures expressly provided by Congress to prevent fiduciary malfeasance. Neither does it add to the ability of individual participants to secure benefits. Benefits are already secured under the benefit recovery provisions of Section 502. But, the Ninth Circuit's ruling has extremely deleterious effects on plans. Unless it is reversed, the decision will adversely alter the decision-making procedures of plan trustees and, by discouraging responsible persons from serving as trustees, significantly inhibit the expansion of the private pension plan system. We now turn to a discussion of these consequences as they apply to multiemployer plans.

II. The Ninth Circuit's Ruling Will Have a Severe Adverse Impact on Multiemployer Benefit Plans and their Participants

Multiemployer plans are integral to the financial security of millions of Americans. The Ninth Circuit's ruling will injure multiemployer plan administration, deter qualified individuals from serving as plan fiduciaries, discourage the process of dispute resolution established by ERISA, and expose fiduciaries to liabilities that they cannot estimate and for which they may be unable to insure themselves. It is likely, moreover, to result in increased litigation against plans (with a concomitant increase in plan administrative costs) since

benefit claimants may file suit or refrain from compromise so that they might seek the windfall of an award of punitive damages. The cumulative effect of this is to undermine the stability of multiemployer plans and effectively halt their expansion. In this section of our brief, we first provide the Court with a brief summary of the structure of multiemployer benefit plans and a discussion of the vital role they play in the benefit security of millions of Americans. We then review the ways in which the Ninth Circuit's decision will adversely affect such plans.

A. The Nature and Importance of Multiemployer Benefit Plans to the Retirement Security and to the Health and Welfare Benefits of Millions of Employees

Multiemployer employee benefit plans play a vital role in the financial well-being of millions of workers. They enable the employees of small and medium sized companies to obtain the level of pension and health and welfare benefits only available from large plans. They permit employees who work for more than one employer in the same industry to accumulate meaningful pension benefits. They also protect pension benefits when an employer leaves the plan. Multiemployer plans support two important features of the American economy: small businesses and a mobile workforce.

Small and medium sized companies often cannot afford sophisticated and generous employee benefits such as those provided by large corporate plans. Large employee benefit plans can profit from substantial economies of scale and can also more accurately reflect the science of "averages," which forms the basis of actuarial predictions. An increase in plan size considerably reduces the risk that a plan may suffer financial adversity because its benefit claims experience does not accurately mirror statistical predictions.

Because multiemployer pension plans generally include many employers in an industry, an employee moving from one employer in the plan to another continues to accumulate benefits without interruption. By their very nature, multiemployer plans provide a form of "portable" benefits which do not exist elsewhere. These portable benefits result in greater benefit security. Multiemployer plans also protect pension benefits because they provide benefits to an employee even though his or her employer leaves the plan.

Congress has recognized that multiemployer plans "typically provide workers with greater retirement security than single employer plans." Senate Labor Committee Summary and Analysis of Consideration of S.1076 (April 1980) *U.S. Code Cong. & Admin. News*, p. 2985. Accordingly, Congress has repeatedly passed legislation to strengthen multiemployer plans. The most comprehensive effort in this regard was the Multiemployer Pension Plan Amendments Act of 1980, which amended ERISA by imposing withdrawal liability upon employers who withdraw from multiemployer pension plans. Section 3 of the Act explicitly states that it is Congressional policy to encourage the maintenance and growth of multiemployer pension plans.[8]

Multiemployer benefit plans are established through collective bargaining agreements. The Taft-Hartley Act of 1947 specifically provided for the formation of trusts to administer health and welfare and pension funds for employees represented by labor unions in collective bargaining with management. 29 U.S.C. § 186(c)(5) and

[8] The 1980 Amendments to ERISA were enacted by Pub. L. No. 96-364, 94 Stat. 1208-1311 (1980). For further discussion of Congressional policy to encourage the maintenance and growth of multiemployer pension plans, see House Ways and Means Committee Report on H.R. 3904 (Rept. 96-869, Part II, April 23, 1980) and House Labor Committee Report on H.R. 3904 (Rept. 96-869, Part I, April 2, 1980).

(6). That statute also required such plans to be managed by trustee boards equally divided between representatives of management and of labor. See *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) for a description of the functioning of such trustees.

Collectively bargained multiemployer benefit plans provide coverage to millions of American workers. Multiemployer pension plans are primarily defined benefit plans. Multiemployer pension plans represent only 2.3% of all pension plans and 3.2% of all defined benefit pension plans. Nonetheless, defined benefit multiemployer pension plans provide pension coverage to 20-26% of all defined benefit pension plan participants.[9] In 1980, there were 1,826 multiemployer defined benefit pension plans in the country. These pension plans covered 8.5 million active workers and over 10 million total participants and beneficiaries.[10]

Multiemployer health and welfare funds provide a similarly large proportion of benefits to American workers. Collectively bargained multiemployer health and welfare plans represent about 10% of all health and welfare plans. Such plans include about 25% of all workers with health and welfare coverage.[11] In 1980, there were 4,500 multiemployer health and welfare funds, of which 3,040 provided basic hospitalization and other health benefits to 8.1 million participants.[12]

[9] Robert D. Cooper and Melody A. Carlsen, *Pension Fund Operations and Expenses (Pension Fund Operations)*, p. 21 (1980) International Foundation of Employee Benefit Plans, Brookfield, Wisconsin.

[10] Cooper, *Pension Fund Operations*, p. 22 n.5, pp. 28 and 85.

[11] Robert D. Cooper, *Multiemployer Health and Welfare Plan Operations and Expenses (Multiemployer Health and Welfare Plan)*, p. 14 (1983) International Foundation of Employee Benefit Plans, Brookfield, Wisconsin.

[12] The other 1,460 health and welfare plans provide other benefits, such as vacation, unemployment, etc. Cooper, *Multiemployer Health and Welfare Plan*, p. 14 n.5.

Multiemployer pension plans annually process hundreds of thousands of benefit claims. Multiemployer health and welfare plans annually process millions of claims. A conservative estimate of monthly average claims processed by multiemployer health and welfare funds in 1979 was between 1,130 and 1,166.[13] The monthly average of claim checks written by such funds was between 1,070 and 1,090.[14] All of these claims are processed by trustees or by administrators acting on their behalf or through insurance carriers. Even when claims are processed by insurance carriers, trustees usually reserve the right to supervise the handling of claims.

Multiemployer trustees are familiar with the particular needs of their industry and are best able to design plans to fit those needs. They frequently devise claims processing and review procedures that meet the needs of individuals working within their industry. While plan trustees and administrators closely monitor the establishment and administration of claims processing rules, they cannot personally handle the volume of claims that must be processed. Some delegation of routine ministerial tasks is essential in order for plan trustees and other fiduciaries to provide for prompt review of all submitted claims.

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[13] Robert D. Cooper and Hetty K. Balanoff, *Technical Report: A Study of Taft-Hartley Health and Welfare Trust Fund Operations Cost* (*Technical Report*), p. 41 (1979) International Foundation of Employee Benefit Plans, Brookfield, Wisconsin. This source, in all likelihood, underestimates the number of claims processed on account of the great variation among plans as to what is considered a "claim." For example, "if an illness generated six bills, each of which was submitted individually, was this six claims? Or if the same six bills were submitted all at once, were these only one claim?" (p. 18). Some funds (46.4%) consider each check a claim, some (39.3%) consider each illness a claim, and some (10.3%) consider each separate piece of paper a claim (p. 41).

[14] Cooper, *Technical Report*, p. 41. Again, these numbers may underestimate the number of actual claims because some plans write one check for several claims submitted by one claimant.

Multiemployer benefit plans perform a valuable public service. They provide benefit coverage to millions of Americans who might otherwise be in dire financial need and process a tremendous volume of benefit claims. The Ninth Circuit's decision will weaken the multiemployer benefit plan system, thereby affecting the benefit security of all workers.

B. *The Ninth Circuit's Ruling will Severely Injure Multiemployer Benefit Plans and their Participants because it will Undermine the Prudent and Careful Administration of Such Plans*

The financial well-being of multiemployer benefit plans, and of their participants and beneficiaries, is dependent upon careful, prudent and reasonable management of all aspects of the plan, including the area of benefit claims processing.

Plan trustees design benefit systems and devise and implement procedures for processing and evaluating claims. While it is, of course, important to make prompt payment of all justified claims, it is likewise important to refuse payment of claims that do not meet plan requirements. Indeed, ERISA § 404(a)(1)(D) mandates this: ". . . a fiduciary shall discharge his duty . . . in accordance with the documents and instruments governing the plan . . . ." If plan requirements were not scrupulously followed, plan assets would be squandered and the benefit security of all participants would be undermined. Plan trustees must balance the interest of the individual benefit claimant against the interests of all other participants in safeguarding the plan's assets through accurate and prudent claim administration.

ERISA does not require that plan trustees and administrators resolve all doubts in the individual participants' favor. Rather, ERISA § 404, 29 U.S.C. § 1904, requires only that fiduciaries act prudently with respect to the plan. They must not make benefit determinations arbitrarily or capriciously. "The trustees of a . . . fund have,

not only the authority, but the duty to insure that payments are made to only those who are eligible." *Feathers v. U.M.W. Health and Retirement Funds*, 99 L.R.R.M. 2287 (D.D.C. 1978).[15] The fiduciaries of a plan must jealously guard the benefit security of *all* participants.

ERISA safeguards individual rights by providing the right to obtain accurate data regarding plan benefits and by requiring prompt claim processing. ERISA § 503 provides that plans must provide "adequate notice" of any benefit denial, "written in a manner calculated to be understood by the participant," and that plans must provide "reasonable opportunity" for a "full and fair review" of any benefit denial. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), further protects the rights of benefit claimants by providing for full recovery of benefits due from a plan plus attorneys' fees and costs.

The Ninth Circuit's interpretation of ERISA § 409 will cause plan fiduciaries to be especially fearful of litigation whenever they review claims because of the possibility that a benefit claimant may seek to assess personal liability against them individually. This very justified fear will significantly distort the entire decision-making process concerning claims. Trustees will be far more likely to acquiesce in the payment of questionable claims. While the approval of one questionable claim will not likely weaken a plan, the cumulative effect of fiduciary acquiescences to such claims over time certainly will have that effect.

C. *The Ninth Circuit's Ruling will Deter Qualified Persons from Serving as Fund Trustees and Administrators*

Multiemployer benefit plans are primarily labor-management funds that are administered by joint boards of labor and management trustees. Unlike single employer plans, multiemployer plans frequently are administered by management trustees who work for geographically dispersed companies (many of them quite small) and by union trustees who are also frequently dispersed geographically.

[15] See also *Moglia v. Geoghegan*, 403 F.2d 110, 116 (2nd Cir. 1968); *Brune v. Morse*, 475 F.2d 858 (8th Cir. 1973); *Boyles v. Central States, Southeast, Etc.*, 602 F.2d 97 (5th Cir. 1979).

Labor and management trustees are not compensated for their time because such payments are prohibited by ERISA § 408(a)(2), 29 U.S.C. § 1108(a)(2). Trustees of single employer plans, who generally work for the plan sponsor, have many strong institutional incentives to perform an important company function by service as trustees. Such persons do not risk a loss of income by serving as trustees. On the other hand, trustees of multiemployer plans receive no institutional rewards for their service. Employer trustees must forego management of their business and may lose income because they take time to serve as trustees; union trustees must forego their organizing tasks. Multiemployer plan trustees agree to serve because of a serious commitment to employee benefit security and because of a desire to perform a service to their union members or to their employees.

Trustees are well aware that the fiduciary requirements of ERISA mandate prudent, honest and selfless plan administration. They are also aware that fiduciary breaches injurious to the fund may result in the imposition of personal liability against them to remedy any injury caused to the fund or to pay excise taxes to the Internal Revenue Service. Generally speaking, fiduciaries can fulfill their obligations and avoid breaches of fiduciary duty by carefully selecting investment managers, accountants, and administrators to perform the day-to-day administrative tasks of the fund, and by thorough periodic review of plan reports, operations, personnel decisions and policies.

Prior to the decision of the Ninth Circuit in this matter, trustees did not fear that personal liability might arise from every benefit decision or ministerial task performed by plan employees or agents. Thus, prior to the

Ninth Circuit's decision, responsible individuals with sound financial and administrative skills have been willing to serve as trustees of multiemployer funds because they could adequately perform their fiduciary duties by providing management and direction without direct involvement in individual claim processing details.

By drastically expanding the scope of personal liability of trustees beyond that contemplated by ERISA, the Ninth Circuit has provided a powerful disincentive for any reasoning person from serving as trustee of a multiemployer plan. Now, the otherwise responsible, prudent trustee is personally liable for any delays or errors of judgment in the handling of benefit claims. The Ninth Circuit has made it virtually impossible for the traditional multiemployer trustee to function. Since multiemployer trustees are generally not compensated, it will be extremely difficult, if not impossible, to find competent labor and management trustees willing to serve in the face of such risk.

Similarly, competent individuals with administrative and financial expertise will be deterred from serving as administrators of multiemployer plans because each daily task that they perform may result in substantial personal liability. Indeed, every task delegated by a plan administrator to a clerical employee will expose her or him to potentially runious personal liability.

The exposure to liability which the Ninth Circuit's fiat has imposed is far beyond the scope of that contemplated by Congress. Congress intended to deter fiduciary malfeasance. But, it did not intend to make service as a voluntary trustee so onerous and fraught with risk as to discourage competent and responsible persons from serving at all.

The result of the Ninth Circuit's decision will be the transfer of all plan functions from labor and management trustees (as envisioned by Congress) to large banks and insurance companies. This result will deprive this country of vital leadership that has previously worked

well to provide benefits to millions of Americans. It will also diminish a major area of labor-management cooperation that Congress has specifically sought to nurture.

D. *The Ninth Circuit's Ruling is Injurious to the Dispute Resolution Process Favored by ERISA*

ERISA § 503, 29 U.S.C. § 1133, and regulations promulgated thereunder, favor internal administrative resolution of disputes concerning benefit claims. Section 503 requires plans to provide adequate notice and explanation of any denial of benefits and a "full and fair review" to all claimants who appeal denials of benefits. This general provision is further elaborated by regulations set forth at 29 C.F.R. § 2560.503-1.

The regulations impose certain requirements for reasonable claims procedures established by plans. Plans must provide for reasonable claim filing procedures that must be communicated to participants. If such procedures are not established, a claim is deemed filed when the participant brings it to the attention of the plan.

Plans must also provide notice and explanation of any denials of claims within 90 days, or, at the most, within 180 days if special circumstances exist. The notice must set forth (1) the reason for benefit denial; (2) the plan provisions on which denial is based; (3) a description of any additional information or materials needed to perfect the claim; and (4) information about how to obtain a review of the denial of benefits.

Finally, plan participants must be given the opportunity to appeal denied claims to the appropriate fiduciary or to a person designated by the fiduciary. The participant must be given access to all pertinent plan documents and an opportunity to submit issues and comments in writing. The decision on review must be made promptly, usually within 60 days after receipt of the request for review, or, under special circumstances (such as the scheduling of hearing), within 120 days after receipt.

The procedures outlined above are designed to promote dispute resolution through the exchange of information by plans and participants. The procedures require a plan to disclose the reasoning behind every denial of benefits and to state if any additional information may change the results. This gives participants the opportunity to offer relevant information that might have been originally overlooked. The resulting process is an essentially nonadversarial dialogue between the plan and the participant that is designed to raise all the arguments and information pertinent to the denied claim and to avoid unnecessary litigation.

Courts have generally required claimants to exhaust their internal plan remedies before filing suit under ERISA § 502. See e.g. *Lucas v. Warner & Swasey Company*, 475 F.Supp. 1071 (E.D. Pa. 1979); *Kross v. Western Electric Co., Inc.* 701 F.2d 1238 (7th Cir. 1983), aff'g in part and rev'g in part, 534 F.Supp. 251 (1982). This is so because the dispute resolution mechanism provided by ERISA is particularly well-suited for resolving disputes that are based on a misunderstanding of plan rules or on incomplete information. Because the internal dispute resolution mechanisms of plans so successfully accomplish their purposes, the federal courts are not overburdened by litigation of routine benefit disputes.

The case at bar is a good example of the proper functioning of internal plan dispute resolution. The participant was advised of the specific reasons for the denial of her claim, had the opportunity to, and did present, additional information, and was ultimately granted full benefits on the basis of information obtained through the dispute resolution process.

The Ninth Circuit's decision will irretrievably damage this valuable and efficient process. Since plan trustees and administrators may now be subject to litigation and to grave personal liability for the performance of even routine ministerial plan functions, they will have a

tendency to be guarded and cautious when dealing with benefit claim denials. They will be hesitant to set forth all the issues frankly and will be reluctant to receive any additional information for fear of violating the time requirements mandated by the regulations. They will also be concerned that any change in a benefit determination result may be used later against them as evidence of impropriety. Flexibility in plan administration will inevitably be reduced thereby resulting in even more litigation. Indeed, some participants may be encouraged to forego a settlement resolution without litigation in the hopes of also obtaining a windfall award of punitive damages.

Before the Ninth Circuit's decision, litigation over benefit claims denials could only result in full payment of the disputed claim and costs incurred in seeking plan benefits. Now, such litigation also threatens unknown and potentially enormous personal liability. The change in fiduciaries' behavior resulting from this new liability concern will decrease the internal resolution of benefit claim disputes and significantly increase the volume of litigation in the already burdened federal courts.

E. *Compensatory and Punitive Damages are not Uniformly Awarded and are Frequently Large and Inconsistent*

Compensatory damages to a claimant whose claim has been erroneously denied or mishandled include damages for all losses and injuries sustained by the claimant as a result of the erroneous determination or claim processing error.[16] The individual elements of compensatory damages vary widely from state to state, and may include such unpredictable elements as damages for mental anguish.[17] Mental anguish has been variously defined as

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[16] See e.g. *Ross v. United States*, 640 F.2d 511 (5th Cir. 1981); *Freeport Sulphur Co. v. S/S Hermosa*, 526 F.2d 300 (5th Cir. 1976); and 22 Am. Jur. 2d Damages § 11, n.12.

[17] See e.g. *Stoleson v. United States*, 708 F.2d 1217 (7th Cir. 1983); *Hysell v. Iowa Public Serv. Co.*, 559 F.2d 468 (8th Cir.

nervous shock, fright or humiliation.[18] For instance, the Ninth Circuit has held that under California law damages for embarassment, humiliation, fear or other forms of mental anguish are recoverable. *Moore v. Greene*, 431 F.2d 584 (9th Cir. 1970) and *Clark v. Celeb Pub., Inc.*, 530 F.Supp. 979 (S.D.N.Y. 1981) (relying on *Moore* as authority for damages recoverable under California law). The Ninth Circuit has also recently held that mental or emotional distress caused by a denial of due process may serve as a basis for recovery. *Vanelli v. Reynolds School Dist. No. 7*, 667 F.2d 773 (9th Cir. 1982).[19] There is no uniform standard of law by which asserted damages of this nature can be verified or measured. And, the amount to be awarded is particularly subjective.[20] The determination of mental suffering may be "essentially subjective" and "evidenced by one's conduct." *Cooper v. Department of Admin., State of Nev.*, 558 F.Supp. 244, 253 (D. Nev. 1982).

Punitive damages are even less predictable. By definition, they do not compensate the claimant for any actual injuries.[21] See *Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 266 (1981). Thus, awards of punitive damages amounts are frequently arbitrary and may be many times greater than actual injuries. The following recent examples of punitive damages awards in California state court litigation illustrate this point: [22]

1977); *Ryan v. Foster & Marshall, Inc.*, 556 F.2d 460 (9th Cir. 1977); 22 Am. Jur. 2d Damages § 195; and Prosser, *Law of Torts* § 54, at 328 (4th ed. 1971).

[18] See 38 Am. Jur. 2d Fright, Shock and Mental Disturbance § 45.

[19] See also *Cooper v. Department of Admin., State of Nev.*, 558 F.Supp. 244 (D. Nev. 1982).

[20] See Am. Jur. 2d Damages §§ 109, 198.

[21] See Am. Jur. 2d Damages §§ 236, 237, 238.

[22] *Jury Verdicts Weekly*, Vol. 26 (1982) Nos. 5:8, 7:10, 12:4, 17:8 and 18:22; Vol. 27 (1983) Nos. 17:31, 44:16 and 52.21; Vol. 28 (1984) Nos. 11:8, 17:25 and 28:16. Jury Verdicts, Inc., Santa Rosa, California.

Name of Case	Superior Court	Type of Case	Actual Damages	Punitive Damages
Triple E. Machinery v. Englebrecht	Norwalk	Embarrassment and humiliation	$ 50,000	$ 102,327
Spieker v. Senator Hotel	Sacramento	Breach of contract	$ 343,310	$ 3,117,946
Downey Savings & Loan v. Ohio Casualty Ins. Co.	Los Angeles	Insurance Bad Faith	$ 123,769.	$ 5,000,000
The P.K.L. Companies v. Eaton Corporation	Los Angeles	Accounting Fraud and Breach of Fiduciary Duties	$2,633,599	$15,000,000
Elmer Sprague v. Equifax, Inc.	Compton	Independent Medical Examination Fraud	$ 100,000	$ 5,000,000
Berk v. National Union Fire Ins. Co.	Los Angeles	Insurance Bad Faith	$ 659,231	$13,054,479
Sullivan v. Kaiser Foundation Health Plan	San Diego	Failure to pay medical claim	$ 45,000	$ 400,000
Coconis v. Ins. Co. North America	San Francisco	Insurance bad faith	$ 3,500	$ 20,000
Gump v. Wells Bank	San Francisco	Breach of trust	$ 34,339	$ 1,000,000
Garvey v. State Farm	Sonoma	Insurance bad faith	$ 47,533	$ 1,110,000
Thompson v. Thompson	Sonoma	Breach of fiduciary duties—real estate	$ 17,000	$ 30,000

As is evident from these examples, no fiduciary will be able to predict the amount of his or her personal liability exposure to such damages.

The availability of insurance coverage for punitive and extrastatutory compensatory damages is doubtful at this time. But, even if such coverage ultimately became available, it would, no doubt, be prohibitively expensive precisely because the risk of liability is so difficult to predict or quantify.

CONCLUSION

The amici curiae urge this Court to reverse the Ninth Circuit because the lower court's decision is contrary to the language of ERISA and the Act's underlying legislative policy. It will, moreover, severely inhibit the expansion of multiemployer plans. In sum, the decision below threatens the vitality of an institution which provides employee benefit security to millions of Americans.

Respectfully submitted,

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